COURT'S ORDER WHETHER THE CASE IS OR NOT APPROVED FOR REPORTING

{Chapter VIII, Rule 32(2)(b)}
Description of Case

CRIMINAL APPEAL No. 235 of 2001
(Old No. 1144 of 1985)

Desh Raj & another

.....Appellants

Versus

The State

....Opposite Party

WITH

CRIMINAL APPEAL No. 239 of 2001
(Old No. 1269 of 1985)

Narendra Singh & another

.....Appellants

Versus

The State

.....Opposite Party

Sri A.S. Gill, learned counsel for the appellants
Sri Amit Bhatt, learned Addl. G.A. for the State

Approved for Reporting
~~Not approved for reporting.~~

Date : May 23, 2007

(Dharam Veer, J.)

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

(1) CRIMINAL APPEAL No. 235 of 2001
Old No. 1144/1985

1. Desh Raj S/o Fakir Chand Mohalla P.S. Sadiq Punjabi Sarai Kashipur Police Station, District – Nainital
2. Sukhvinder Singh R/o Chanakpur P.S. Kashipur District Nainital.

.....Appellants

Versus

The State .....Opposite Party

AND

(2) CRIMINAL APPEAL No. 239 of 2001
Old No. 1269/1985

1. Narendra Singh S/o Mohar Singh
2. Smt. Mahendra Kaur W/o Didar Singh
   R/o Village Ramanawala, P.W. Thakurdwara,
   District Moradabad.

.....Appellants

Versus

The State. ..... Opposite Party

Dated: May, 23, 2007

Sri A.S. gill, learned counsel for the appellant
Sri Amit Bhatt learned Addl. GA for the State

HON. DHARAM VEER, J.

This appeal has been preferred against the judgment and order dated 24.04.1985 and 6.05.1985 passed by learned II Additional Sessions Judge, Nainital whereby the learned II Additional Sessions Judge has acquitted the accused Swarn Singh, Ganeshi, and Chhinder Singh u/s 395, 397 and 412 I.P.C. and the appellants Narendra Singh, Sukhvender Singh, Deshraj and Mahender Kaur were convicted u/s 412 I.P.C. and sentenced for 5 years R.I. to each of them. Appellant Narender Singh was also convicted u/s 25 Arms Act and sentenced to one year R.I. Both the sentences were directed to run concurrently. However, the appellant Narender Singh was acquitted from the offence punishable u/s 395 and 397, I.P.C. The order of the

sentence was passed against Narendra Singh and Mahendra Kaur on 6.05.1985, as they were not present in the court on 24.04.1985.

2. Both these appeals have been preferred against the same judgment and order and against the same incident. Hence, both these appeals are being decided by this common judgment and order.

3. In appeal No. 239/01 (Old appeal no. 1269/1985), the appellants Narendra Singh and Smt. Mahender Kaur, had died. As per the report of C.J.M. Udham Singh Nagar dated 24.04.2007, it is reported that appellant Narendra Singh had died in the year 2005. As per the report of Chief Judicial Magistrate, Nainital, dated 30.04.20007, Smt. Mahendra Kaur had also died. As both the appellants in this appeal have died, hence the appeal against the appellants Narendra Singh and Smt. Mahendra Kaur stands abated. In appeal No.235/01 (Old No. 1144/1985) the appellant no. 1 Desh Raj had died. The Chief Judicial Magistrate, Udham Singh Nagar, has submitted by his report on 7th May, 2002 that appellant Desh Raj had died 15 years back. Hence, the appeal against Desh Raj also stands abated. Now the only appellant is Sakhwinder Singh is alive and trial court has convicted the present appellant under Section 412 I.P.C. and awarded sentence of 5 years R.I.

4. In brief the prosecution story is this that the complainant Jagmer Singh Verma was a secretay in "Mandi Samiti" Kashipur, and he was living at Mohalla Mahespura Kashipur, in a rented house. In the night on 16.10.1979 at about 2 A.M., five miscreants, four out of them were armed with guns and one was armed with the pistol and sabbal, entered into his room. He got him up

after hearing the sound of miscreants. They all rounded up the complainant and his other family members. The complainant saw that one of the miscreants was standing pointing his gun on his youngest small child. He demanded the key of the safe from the complainant and asked him to face consequences, if he would raise alarm. Meanwhile, one of the miscreants snatched out the golden chain out of the neck of the wife of the complainant and removed the ear-rings (Kundal) from her ears. The miscreants took the complainant to the adjacent room where the safe was lying along with the bunch of the keys. In that room Tripal Singh cousin brother-in-law of the complainant was sleeping. After hearing the noise, he got up. The miscreants got opened the safe from the complainant and looted ornaments, cash and clothes belonging to the complainant. They also looted one transistor, one wristwatch and Rs.600/- out of the pocket of the pant of the Tripal Singh hanging in that room on a peg. The miscreants went back after bolting the doors of the house from out side. They also took the entire looted property with them. After that the complainant gave a call to his neighbour Sri Prithvi Singh who opened the door of the house of the complainant. The complainant told the entire incident to him. In the electric light, which was there in the house of the complainant, the complainant and his other family members had seen the miscreants at the time of the alleged incident. The complainant then lodged the report at Police Station of 16.10.1979 at 3.30 A.M.

5. The report lodged by the complainant is Ex.Ka-2 and on the basis of this report, a Chick Report was prepared i.e. Ex.Ka-3 and the entry was made in the General Diary, the copy of the General Diary is Ex.Ka-4. These documents were prepared by the Head Moharrir,

Dharmbir Singh, PW.5 who has proved the chick report and the copy of the General diary on the basis of his statement on oath.

6. The investigation was entrusted to Gajendra Singh Thapa, PW.15, who was posted as Station Officer in Police Station, Kashipur at the relevant time. He has recorded the statement of the witnesses, inspected the spot and took in his possession three electric bulbs which were said to be burning at the time of the incident on spot and they were given in the Supurdagi of the complainant, that memo is Ex.Ka.1. The site plan of the place of occurrence was prepared by the Investigating Officer i.e. Ex.Ka-15.

7. On 16.11.1979, the Investigating Officer was on patrol duty along with some other Sub Inspectors and Constables. At about 8:30 P.M., the police party saw three persons standing at the Tiraha of Moradabad – Kashipur- Jaspur. They were frightened after seeing the Jeep of the Police coming towards them and this caused suspicion in the mind of the police party. The police party rounded them up and enquired from them about their names. One of them stated his name as Narendra Singh alias Ninder Singh, another as Sukha Singh alias Sukhvendra Singh and the third one as Smt. Mahender Kaur. On being searched, from the possession of the appellant Sukhvendra Singh, one bag, one kurta, one pant terricot and one pair of gold ear-rings(Kundal) were recovered. The witness PW.15 Gajendra Singh, got prepared a memo of these proceedings through S.I. Brijendra Juyal, that memo Ex.Ka-7 is on record and the recovered items from the appellant Sukhvinder Singh were sealed on the spot. A site plan of the place of the recovery was also prepared by the Investigating Officer

and proved the same in statement Ex.Ka-16. The recovered items from the appellant were also identified by PW.1 Jagmer Singh and PW.2 Smt. Sunita and the identification proceeding was completed by Tehsildar Magistrate, Kashipur, i.e. Ex.Ka.6 After completing the investigation, the Investigating Officer has submitted the charge sheet in the court of Munsif Magistrate Ex.Ka-19.

8. Leaned Munsif Magistrate has committed the case to the court of sessions by his order dated 09.09.1984.

9. Thereafter, the learned II Additional Sessions Judge, Nainital has framed the charge against Narendra Singh alias Ninder Singh, Lakhvender Singh alias Lakha, Swarn Singh alias Swarn, Ganeshi and Chhinder Singh under Sections 395 and 397 of I.P.C. on 11.10.1982. The charge was explained to the above said accused persons who pleaded not guilty and claimed to be tried. On the same day on 11.10.1982, the learned II Additional Sessions Judge, Nainital has also framed charge against Lakhvender Singh alias Lakkha under Section 412 I.P.C. The charge was explained to him who pleaded not guilty and claimed to be tried. On the same day, the learned II Additional Sessions Judge, Nainital has framed charge against appellant Smt. Mahendra Kaur under Section 412 I.P.C. The charge was explained to her who pleaded not guilty and claimed to be tried. On the same day, the learned II Additional Sessions Judge, has also framed charge against Narendra Singh alias Ninder Singh under Section 25 of the Arms Act and under Section 412 I.P.C. The charge was explained to him who pleaded not guilty and claimed to be tried. On the same day, the charge under section 412 I.P.C. was framed against appellant Desh Raj who also pleaded no guilty and claimed to be tried, and on the same day the charge under Section 412

I.P.C. was framed against the present appellant Sukkha alias Sakhwinder Singh who also pleaded not guilty and claimed to be tried.

10. To prove its case, the prosecution has examined PW.1 Prithvi Singh, PW.2 Jagmer Singh, PW.3 Smt. Sunita, PW.4 Tripal Singh, PW.5 Head Constable Dharamveer Singh, PW.6 Jameel Ahmad, PW.7 Gurbachan Singh, (Tehsildar) PW.8 S.I. Balbeer Singh, PW.9 C.S. Bakshi, (S.D.M.), PW.10 Murli Monohar Saxena, Head Constable, PW.11 Shivdhyan Singh, Sub-Inspector, PW.12 H.M. Bhaskaranand, PW.13 G.D. Rastogi, PW.14 Amar Singh and PW.15 Gajender Singh Thapa. After that the statement under Section 313 of the Cr.P.C. of the appellants were recorded. They have denied the allegations made against them and present appellant Sukhvender Singh has also stated that he was falsely implicated.

11. After examining and appreciating the evidence on record, the learned II Additional Sessions Judge, Nainital has acquitted the accused Lakhvender Singh under Section 395, 397, 412 I.P.C. Swaran Singh under Section 395/397 I.P.C., Ganeshi under Section 395/397 I.P.C. and Chhinder Singh under Section 395, 397 I.P.C. and has convicted Narendra Singh, Sakhwinder Singh, Desh Raj and Mahender Kaur under Section 412 I.P.C. and awarded sentence for 5 years R.I to each of the appellants and appellant Narendra Singh was also convicted under Section 25 of Arms Act and awarded sentence for one year. Out of these four appellants who have been convicted by the II Additional Sessions Judge, Narendra Singh, Desh Raj, and Smt. Mahender Kaur had been died and for this reason, the appeal stands abated

against them. Now, the appeal is only alive against the appellant Sukhwinder Singh alias Sukkha.

12. I have heard Sri A.S. Gill, learned counsel for the appellant and Sri Amit Bhatt, learned Additional G.A. for the State and perused the entire material available on record.

13. Against the appellant Sukhvinder Singh, the only charge is this that on 16.11.1979 at about 8:30 P.M., when he was arrested by the Police party one bag, one kurta, one pant terricot, one pair of ear-rings (Kundal) were recovered from his possession. For that recovery memo was prepared that is Ex.Ka-7 and that recovery was made by the present Investigating Officer of the case Gajender Singh Thapa PW.15 along with the Brijendra Juyal S.I., Balbeer Singh S.I., Constable Krishnanand, Constable Prayag Datt and for that recovery they have prepared the Fard Ex.Ka-7. For proving of this recovery, the prosecution has examined tow witnesses, these witnesses are PW.8 Balbeer Singh and PW.15 Gajender Singh Thapa and the third evidence witness against the appellant is Gurbachan Singh PW.7, (Tehsildar) who has conducted the identification of the recovered items from the possession of the appellant.

14. Learned counsel for the appellant has submitted that the PW.8 Balbeer Singh who was shown to be present at the time of the recovery of the above said items from the possession of the appellant, has stated that on 16.11.1979, he was posted as Sub-Inspector in Police Station, Kashipur. On that day, he was in the patrol duty along with the Inspector Gajender Singh Thapa and S.I. Brijender Juyal, and along with two constables Krishna nand and Prayag Dutt. They were coming from

Moradabad Road towards Kashipur at about 8.30 P.M. and when they reached in Jaspur Tiraha, then they saw two persons and one lady in the Jeep light. In the night they have asked for one person who had a brief case in his hand and had run away towards Jaspur, then all the police party caught them. The persons who were arrested were Narender Singh alias Ninder and another is Sukha alias Sukhvender, appellant, and third one is Mahender Kaur. He has stated that from the possession of Sakhvendra Singh, one bag was recovered, in which clothes were there. *"Sukhvender Singh ka pas ek bag mila jismai Kaprai tha".* After that a Fard was prepared on the spot by V.K. Juyal that is Ex.Ka-7.

15. Learned counsel for the appellant has submitted that S.I. Balbeer Singh has not stated in his statement that the items mentioned in the recovery memo is Ex.Ka-7, were recovered from the possession of appellant Sukhvender Singh alias Sukha. Hence, the recovery shown from the possession of the appellant is false and concocted. From the evidence of the S.I. Balbeer Singh, it is clear that he has not stated in his statement about the items which were shown in the recovery memo, were recovered from the possession of the appellant Sukhwinder Singh. In this way, PW.8 S.I. Balbeer Singh has not supported the prosecution case for the recovery of the items i.e. one pant, one kurta, one pair of ear rings (Kundal) from the possession of the appellant. One bag which was also shown to be recovered from the possession of the appellant was not put for the identification proceeding, as it is clear from the identification memo i.e. Ex.Ka-6. Balbeer Singh PW.8 is one of the witnesses of the recovery.

16. Gajender Singh Thapa is PW.15, who has stated in his statement that in October, 1979 to March 1980, he was posted as an Inspector in Kashipur. The investigation of the case conducted by him. During the investigation, he has taken the statement of the witnesses and three bulbs, which were burning at the time of the incident, were taken in possession and Fard was prepared that is Ex.Ka.1. He has also inspected the site and prepared the map. That map is Ex.Ka.15. He has further stated that on 16.11.1979 along with the other Sub-Inspectors and constables have arrested three persons at about 8:30 P.M. in the night at Moradabad, Kashipur, Jaspur Tiraha, out of three one is present appellant. He has further stated from the possession of the applicant one beg, one kurta (Lucknowia), one pant terricot, and one pair of ear-rings(Kundal) were recovered and for that the Fard Ex.Ka.7 was prepared on the spot. The Fard was written by S.I. Brijender Juyal, on the dictation of the present witness, and he has also signed the Fard and then the recovered material was sealed on the spot in the separate sealed bundles. He has also prepared the map from where these materials have been recovered, i.e. Ex.Ka-16. He has also stated that the recovered material was also identified in the court and after completing the investigation he has submitted the charge sheet that is Ex.Ka-19. He has also proved the recovered material in the court that is Ex.1 to Ex.11.

17. Learned counsel for the applicant has submitted that S.I. Balbeer Singh, had not stated that the items shown in the Fard Ex.Ka.7 were recovered from the possession of the appellant Sukhvender Singh alias Sukha at the time of arrest on 16.11.1979 at about 8.30 P.M. at Moradabad, Jaspur-Kashipur-Tiraha. He has

further submitted that the case of the prosecution is this that the said items were recovered in the presence of PW.8 S.I. Balbeer Singh by the police party who has arrested the appellant. He has further argued the only witness against the appellant is PW.15 Gajender Singh Thapa, who was the Station Officer on the date of the incident and was also the Investigating Officer of the case and he was also present at the time of the arrest. He has further submitted that S.I. Balbeer Singh had not supported the case for the prosecution hence, the conviction cannot be based on the basis of the solitary evidence of PW.15 Gajender Singh Thapa. He has further argued that PW.15 Gajender Singh Thapa, is the Police Office and not an independent witness and he is also the Investigation Officer. Therefore, on the basis of his solitary evidence, the conviction is not possible as per the law. For the support of his above said submission, learned counsel for the appellant has cited the judgment of Rajasthan High Court in the case of "*Kasim Ali and others Vs. State of Rajasthan*" reported in the Crime Volume VIII-1991 (2) Pg.806. In Para-2 of the above said judgment it has been held as under:-

> ***2. The case of the prosecution is that on the night intervening between 30th and 31 March, 1981 a dacoity was said to have been committed by certain persons in village Nohand Vijai Nagar Bachamdi and in that incident the appellants were arrested and they were put to identification parade after about one and half months. After investigation, the police submitted a challan for the offence under Section 395, 396, abd 397, I.P.C. against twenty persons including appellants. The learned Trial Court framed charges against all the accused persons including the appellants for the offence under Sections 395, 396, 397 and 412, I.P.C. After recording the evidence and hearing the parties the learned Trial Court came to this conclusion that ingredients of***

offence under Sections 395, 396, and 397, I.P.C. are lacking and the appellants have been acquitted of the said offence but it convicted the appellants under Section 412, I.P.C. holding that they were receiver of the stolen property. Both the learned counsel agreed that in case dacoity against any person is not proved then conviction under Section 412, I.P.C. cannot be held to be bad because this point stands well settled by series of decisions of this Court as well as the Hon'ble Supreme Court. The learned counsel for the appellants submitted that in the instant case the learned Trial Court erred in holding the appellants guilty for the offence under Section 412, I.P.C. because the prosecution utterly failed to prove the recovery against the appellants. The learned counsel submits that PW.12 (Satveer) and PW.13 (Sri Lal) were produced by the prosecution who were the Motbir witnesses of the recovery but they turned hostile and the learned Trial Court, on the basis of statement of the Investigation Officer who was also present at the time of recover, found the appellants guilty for the offence under Section 412, I.P.C.

The learned counsel submits that conviction on the statement of I.O. on the point of recovery is not possible. In support of their submission, the learned counsel referred to the cases reported in 1984 Crimes Page 356 and 909. In these cases it has been observed that recovery cannot be held to be proved by the prosecution solely on the testimony of Investigation Officer and in these cases their Lordships of the Allahabad and Orrisa High Courts respectively held that conviction under Section 412, I.P.C. is not possible solely on the testimony of the Investigation Officer who recovered the stolen property before the Motbir witnesses. Similar situation is in the instant appeals and I find no reason to disagree with the proposition of law laid down in the aforesaid cases decided by Allahabad and Orrisa High Courts.

18. The argument advanced by learned counsel for the appellant has got force in view of the judgment passed by Rajasthan High Court in Kasim Ali (**Supra**). The conviction of the appellant only on the basis of the

statement of Gajender Singh Thapa, who is the Police Officer and Investigation Officer of the case, is not possible, as he has only stated that the items shown in the Fard i.e. one kurta, one pant terricot, one bag, one pair of ear-rings (Kundal), were recovered from the appellant Sukhvender Singh at the time of arrest from his possession. In view of this, the prosecution has not able to prove its case against the appellant beyond reasonable doubt and hence the conviction and sentence against the appellant is not justified.

19. Learned counsel for the appellant has further argued that the identification of the above said items were not taken place as per the rules and laws, for that he has cited Rule 61 of the General Rules Criminal in which it was cited. Rule 61 of the said Rules is reproduced as under:-

> ***61. Memo of identification proceedings*** –
> *[Identification proceedings in jail for the identification of suspects shall invariably be recorded by magistrates in Form No. 34 (Part IX, No.65) in duplicate by the use of carbon paper [and ball pointed pencils]. The original shall be sent to the court concerned and the carbon copy shall be made over to the jail authority for record and production in court, when needed.]*
> *Proceeding for the identification of property shall be recorded by magistrates in Form No. 37 (Part IX, No.67).*

The above quoted rule 61 of the General Rules (Criminal) provides that the proceeding for the identification of the property shall be recorded by the Magistrate in form 37(Part 9 No. 67). Form No. 37 is quoted as under:-

Form No. 37
(Chapter VIII, Rule 61)

Identification of property held at.....in crime no.....under section .....of police station.....district.....in the Court of .....Class on.....19 ,at .....a.m./p.m

Serial number of exhibit I II III IV V VI VII VIII IX X Remarks	
Name of accused from Whom recovered.	
Name of articles to be identified.	
Number of articles mixed.	
Any condition of the Article which is likely to Affect identification.	
Precaution taken regarding above.	
Names of witnesses with Parent age and residence: Witnesses.	Signature or thumb impression of
1.	1.
2.	2.

1. The property to be identified was brought by .....Court Moharrir/ Police Constable No.....of my Court moharrir/Police Station in.....sealed bundles from.....The articles to be mixed up were brought by.....Contractor/tahsil peon in.....sealed bundles. The seals were intact and were opened before me. The witnesses were called one by one. Every precaution was taken to ensure that no succeeding witness communicated in any manner with the preceding one.

2. The articles mixed up were similar in appearance to those for identification except as to details given in remarks column.

3.....was present on behalf of the prosecution.....was/were present on behalf of .....accused.

Dated the.....day of.....19.....

Part IX, No. 67. **Magistrate.**

20. Learned counsel for the appellant has argued that the identification of the articles was not taken place as per the law. He further submitted that in the identification memo, the bag shown to be recovered from the possession of the appellant was not put for the identification which is also clear from the identification memo i.e. Ex.Ka.6. The items put for the identification were one kurta, pant, and one pair of ear-rings (Kundal). The learned counsel for the appellant has argued that the number of articles mixed with the articles, which were put for the identification, were not written in the identification memo. From a perusal of the memo Ex.Ka.6, it is clear that the number of items mixed in the original items were not in the identification memo and as such it also creates a doubt in the identification proceedings. Moreover, the bag was also not produced for

identification proceeding. Hence, for this reason also, the prosecution story is doubtful.

21. Learned counsel for the appellant has further argued that the prosecution has failed to establish that the articles shown to be recovered from the possession of the appellant were received dishonestly and knowingly that it is a stolen property transferred by the commission of a dacoity.

22. On the basis of the above submission, learned counsel for the appellant has submitted that there is no offence made out against the appellant u/s 412 I.P.C. Section 412 of IPC is reproduced as under:-

> ***Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person, who he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall come under the definition of 412 I.P.C.***

23. From a perusal of section 412 IPC quoted above and the evidence discussed above, the prosecution has failed to prove beyond reasonable doubt that the items one kurta, one pant terricot, one bag, one pair of ear-rings (Kundal) wee recovered from the possession of the appellant and these items were dishonestly received or retained by the appellant knowingly that it is a stolen property and has reason to believe to have been transferred by the commission of dacoity. For the above said reasons, the conviction and sentence of the appellant Sukhvinder Singh u/s 412 IPC is also not justified.

24. On the basis of the evidence of P.W. 8 S.I. Balbeer Singh and PW.15 Gajender Singh Thapa, it creates a doubt in the prosecution case about the recovery of the above said items i.e. one kurta, one bag, pant terricot,

one pair of ear-rings(Kundal) as shown to be recovered from the possession of the appellant. The prosecution has also failed to establish beyond reasonable doubt the recovery of the above said items from the possession of the appellant on 16.11.1979 at about 8.30 P.M. at Jaspur-Kashipur-Moradabad-Tiraha. Thus, on the basis of the above said evidence, the offence under Section 412 I.P.C. is not made out against the appellant Sukhvinder Singh.

25. For the reasons discussed above, appeal of the appellant Sukhvinder Singh (appeal No.235 of 2001) is allowed and the conviction and sentence passed by the learned II Additional Sessions Judge, Nainital convicting appellant Sukhvinder Singh under Section 412 I.P.C. and sentencing him for five years R.I. is hereby set aside. The appellant Sukhvinder Singh is on bail. His bail bonds are cancelled. He need not surrender. However, the appeal of Desh Raj (Appeal No. 235 of 2001) stands abated in view of the fact that he has been died 15 years back.

26. Appeal No.239/01 (Old appeal no.1269/1985) is abated in view of the fact that the appellants Narender Singh and Smt. Mahender Kaur, have died.

(Dharam Veer, J.)

Rajeev Dang
23.05.2007.